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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Corporation, Petitioner,
vs.
SAMUEL A. SPERBER, Respondent.
No. 783.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, Petitioner,
vs.
SAMUEL A. SPERBER, Respondent.
No. 784.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The statement of the case as it appears in petitioner's petition for the writ of certiorari herein, while condensed, will no doubt serve to indicate the nature of the questions involved, and therefore no further statement by respondent (plaintiff) will be made, except the statement, which we believe has a direct bearing upon the matter to be considered, that plaintiff (insured) ever since he was 14 years of age was engaged in the business of hairdressing (R. 84).

ARGUMENT.

(1)

The Failure to Charge the Jury in Respect to Material Evidence in Favor of Plaintiff on the Question of His Occupation Was Prejudicial Error and Affected Plaintiff's Right of Recovery as to Both Defendants. The Question of Consolidation of Causes Is Beside the Point.

While the cases by agreement were consolidated for trial, the evidence was introduced on the issues in both cases and affected the question of recovery against both defendants. It was contended by the defendants that plaintiff was an executive and manager, and by plaintiff that he was and had always been a hairdresser. Plaintiff contended his injuries resulted in total and permanent disability as a hairdresser, the only occupation he engaged in, while defendants contended plaintiff was performing executive, managerial and supervisory duties, and was not disabled in performing such duties. The issues were clear and the Court in its charge informed the jury what the application for the policy in the Connecticut Mutual Life Insurance Company stated in respect to plaintiff's occupation, while omitting entirely to state what the application for the New York Life Insurance Company policy stated in this regard. The evidence omitted in the charge was vital on the issue of liability as to both defendants.

In petitioner's brief in support of the petition for the writ it is stated (p. 8) that the Court of Appeals erred in its assumption that the consolidation of the causes for trial had the effect of merging or converting the actions into one action. We find no such assumption by the Court of Appeals.

The error, however, exists whether the cases be treated as merged or separate, since it is an error common to both defendants.

(2)

Under Proper Circumstances a Definite Request for an Additional Charge to the Jury Should Be Made. However, Under the Record Here This Question Is Not Involved.

We shall not set out the record (R. 367) on this point here, since petitioners have done so in their brief (Pet. Brief 15).

The cases cited by petitioners under point 2, in our opinion, are not in point because they involve a theory of law not applicable to the record here. We desire to briefly discuss these cases.

In Backus v. Fort Street Union Depot Co., 169 U. S. 557, the trial court, in charging the jury, said, l. c. 574: "I shall not call your attention to any particular part of the testimony in the case * * *." And the opinion in the case indicates the trial court did not do so. So we do not see how this case bears on the question raised here.

In Keystone Coal & Coke Co. v. Fekete et al. (C. C. A. 6), 232 F. 72, the opinion indicates that the charge to the jury was a general charge. We do not find in the opinion any help on the question.

In Young v. Corrigan (C. C. A. 6), 210 Fed. 442, a reading of the opinion shows that error was charged because the Court should have limited certain evidence to mitigation of damages. This case is not in point under the facts in the instant case.

In Frizzell v. Omaha St. Ry. Co. (C. C. A. 8), 124 Fed. 176, the Court in its opinion said, loc. cit. 180:

> "* * * the only basis for their complaint regarding the portion of the charge now under consideration is a bare exception to it which specifies no ground or reason for the challenge."

We cannot see how this case supports petitioners' contention. The other cases cited are likewise not applicable to the question presented by the record.

The question here is that the Court gave a charge to the jury on a very material and vital point in the case and singled out and gave undue prominence to evidence favorable to petitioners (defendants below) and omitted evidence on said point favorable to plaintiff. An instruction of this character is not conducive to a fair trial. The Court of Appeals properly ruled on this point, and cited several cases, among which is the case of Starr v. United States, 153 U. S. 614, 626, where this Honorable Court said:

> "The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him * * *."

The error or omission in the charge was properly called to the trial court's attention and the trial court appeared to be satisfied with the charge and told counsel to save his exceptions (R. 366, 367). There was no need for a request for an additional charge, since the Court should, in stating the evidence, state it impartially and with reasonable accuracy as to both parties. This is especially true where the charge attempts to set forth the evidence on a vital and material issue in the case.

(3)

The Court of Appeals Followed the Law as Declared in a Long Line of Missouri Cases on the Question of Total and Permanent Disability.

We shall not set forth the definitions as to total disability as contained in the policies because petitioners have done so (Petitioners' Brief 18).

In its opinion the Court of Appeals has cited several Missouri cases in regard to the construction of provisions

such as are contained in the instant policies. Among these cases is Stoner v. New York Life Insurance Company (Mo. App.), 90 S. W. (2d) 784. The Stoner case came before this Honorable Court later on. Stoner v. New York Life Insurance Company, 311 U. S. 464. The opinion in the Stoner case (Mo. App.), 90 S. W. (2d) 784, is quite lengthy and covers the subject quite thoroughly and reviews a number of Missouri cases. The rule as laid down there in reference to total and permanent disability provisions as contained in the policies in question appears to be the Missouri law and rule and has been followed in like circumstances in a long line of Missouri cases. The provision as to total and permanent disability benefits in the policy referred to in the Stoner case is practically the same as the provision in reference to disability benefits contained in the policies in the present cases.

In the brief of petitioners (p. 23) there is set forth an entire paragraph of the opinion in the Stoner case (Mo. App.), a part of which paragraph was quoted in the opinion of the Court of Appeals. The petitioners' purpose was, no doubt, to indicate that the Court in the Stoner case (Mo. App.) was excluding from its consideration a certain clause of the policy there in question. However, this case, as well as many other cases in Missouri, sustains the Court of Appeals in stating the Missouri rule.

For instance, in the Stoner case opinion (Mo. App.), following the part which petitioners quote in their brief (p. 23) will be found the following (90 S. W. [2d], loc. cit. 793):

> "So far as it appears to us, there is no reason why any different construction as to their meaning shall be given to the provisions of the four policies in suit **with the last clause therein** from that which has heretofore been consistently given by the courts to policies of the same or similar character which did not contain such or a similar clause. **Such last clause does**

not have any effect to alter, change, or modify the other provisions of said policies or their meanings, as such meaning has been ascertained and declared by the courts when found in other policies of the same or similar character. * * * It follows in the case at bar, and we so hold, that it is unnecessary that the insured, to be totally disabled within the meaning of the policies sued on and to be entitled to recover the benefits sued for, should be utterly helpless and unable to do and perform any act or acts in connection with his occupation as a farmer, but if he is unable substantially to do and perform the acts of his occupation (that is substantially to do and perform the material duties required of him as a farmer in the prosecution of his business of farming on the farms operated or managed by him as owner, which the evidence shows him to have been), then he is within the meaning of such policies totally disabled, notwithstanding that he may be able to do some act or acts in connection therewith; and it also follows, and we so hold, that whether, under the facts in the record, considering both those acts which he is able to do and those which he is not, he is unable substantially to carry on his occupation and is totally disabled is a question for the determination of the jury. * * * The policies in suit insured plaintiff against total disability by reason of bodily injury or disease whereby he should be wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit. At the time of the issuance of the policies as shown by the application therefor (made a part of such policies) his occupation was that of a farmer engaged in the prosecution of the business of farming upon certain farms being operated or managed by him as owner." (Emphasis ours.)

And in this same opinion (at loc. cit. 796 and 797) the Court further says:

"The defendant relies on the last clause in the policies, above referred to, relating, as it claims, to plain-

tiff's conduct and providing that, if plaintiff shall engage in any business, etc., no further benefits shall be paid him, and insists that it is entitled to such instruction by reason of the provisions of such clause based upon the plaintiff's conduct since his injuries in undertaking to manage and operate said farms and in undertaking to direct operations thereon and in renting the same or parts thereof to others. **However, we have held that the language of said clause is to be given the same construction as to its meaning as that given the same language in the insuring clause of such policies relating to disability;** and it therefore follows that the plaintiff is not to be denied benefits by reason of the provisions of said clause by reason of his conduct in undertaking to operate and manage his said farms and to direct farming operations thereon unless in such undertaking he is able to perform in a substantial way all of the material **duties of his occupation as a farmer** engaged in the actual operations which he is undertaking to perform." (Emphasis ours.)

In Harms v. Mutual Life Insurance Company of New York, 127 S. W. (2nd) 57, it appears that the policy contained the provision that (loc. cit. 59):

> "Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the insured to follow a gainful occupation."

In the Harms case the plaintiff was the operator (like the plaintiff was in the instant cases) of a beauty shop and he became deaf. In the course of its opinion the St. Louis Court of Appeals said (loc. cit. 60):

> "We think the jury was justified in finding that plaintiff, by reason of her deafness, was unable to perform the usual, customary and substantial duties of **her own occupation** in the usual, customary and safe man-

ner; and also in view of her age, training, experience, limited education and physical condition, she is unable to successfully pursue any other gainful occupation. We are mindful of the fact that in Missouri the holding, as to what is the meaning of total and permanent disability, is more liberal than in some other jurisdictions. Frankly, we prefer to follow the liberal view." (Emphasis ours.)

In Katz v. Union Central Life Insurance Company, 44 S. W. (2nd) 250, the Court had before it a provision with practically the same meaning as in the instant cases, and the Court, after discussing the rules of construction which should apply in Missouri to these provisions, said (loc. cit. 252):

"Applying these general rules of construction to the case at bar, we hold * * * that it was a question for the jury to decide whether or not plaintiff had become, and still was, incapacitated from performing any substantial part of **his** ordinary duties, thereby presenting a case of total disability, even though he was still able to perform a few minor duties." (Emphasis ours.)

In Wall v. Continental Casualty Company, 86 S. W. 491, the St. Louis Court of Appeals had before it a provision similar in construction to the one presented in the instant cases and during the course of its opinion the Court said (loc. cit. 498):

"It never could have been the understanding of parties that the plaintiff should get nothing from the company, if accidentally disabled to do anything he knew how to do, because perchance there were occupations which he might have worked at if he had understood them. **When the language of the policy is the broadest, it is used with reference to the lot in life of the insured, his vocation and capacity.**" (Emphasis ours.)

In Kane v. Metropolitan Life Insurance Company, 73 S. W. (2nd) 826, the Springfield (Mo.) Court of Appeals had before it a case in which the disability provisions were very similar in their meaning to the provisions in the policies in the cases now before the Court. And in the course of its opinion the Court said (loc. cit. 829):

> "We think the narrow rule contended for by defendant, and seemingly supported by some foreign authorities, is not in harmony with the rule in Missouri, and in the majority of the states of this country. We shall not write at length setting out what various opinions have held under the different facts, **but we have reached the conclusion**, after reading many cases, **that the general holdings under facts similar to these and under contracts worded similar to the ones under consideration here, are that the insured is totally and permanently disabled, so as to bring him within the provisions of the policy, when he is no longer able to perform the usual, customary and substantial duties of his own occupation, and when in view of the insured's age, training, experience, education and physical condition, there is no work or occupation in which he can engage for profit.**" (Emphasis ours.)

In Bellows v. Travelers Insurance Company, 203 S. W. 978, the Missouri Supreme Court (en banc) was considering a case in which the policy contained a provision very similar to the provisions in the policies now before the court, and in the course of the Missouri Supreme Court's opinion, in referring to plaintiff's business, it was said (loc. cit. 983):

> "He spent many years in building it up and it was but natural that he would have a strong desire to keep in touch with it and observe and consult and advise with reference to its business, which was also his own. Nothing but death or complete mental collapse equivalent to death could extinguish this in a normal man.

> It was hard to keep him away. * * * **It cannot be that parties intended that before an assured could recover on the policy he should lie the full period of his injury in a state of coma. To interpret the clause in its contractual sense, as defendant seeks to have us do, would render the contract utterly useless to an assured and would be nothing short, practically speaking, of collecting a premium without rendering a consideration. We therefore find ourselves driven back to the position taken by the authorities on the construction of the first part of the clause, viz., that the disability meant is a disability as to the performance of any substantial part of the business.**" (Emphasis ours.)

The above cases are but a few of the long line of Missouri cases which have followed the liberal view in the interpretation and construction of the meaning of provisions in policies of insurance like the ones in the present policies. The Court of Appeals holds that Missouri courts adhere to the so-called "liberal" rule in the construction and scope of total disability provisions as used in insurance contracts, and further held:

> "That rule is that the disability is total if it **renders insured 'unable substantially to perform the duties of his occupation**; that is, unable to perform in the usual and customary way the substantial acts of his occupation.' "

That appears to be the correct rule applicable in the instant cases, under the facts and circumstances there, and is sustained by an abundance of Missouri authorities.

It should be kept in mind that insured here has followed the occupation of "hair dresser" or "hairdressing business" ever since he was approximately 14 years of age, and at the time his disability arose he was 49 years of age (R. 83).

It is therefore respectfully submitted that these cases are not proper ones for review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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